MALAYSIAN AIRLINE SYSTEM BHD A

v.

YONG CHONG HEE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-1401-2009]
8 SEPTEMBER 2010

CONTRACT: *Contractual terms - Express terms - Airline pilot, training course for - Obligations of parties under contract - Alleged wrongful termination of training course - Burden of proof - Whether on first respondent pilot* C

CONTRACT: *Terms - Acceptance of offer - Airline pilot, training course for - Agreement - Alleged breach - First respondent agreed to remain in service with appellant for three years from date training commenced - First respondent resigned after five months - Whether liable for breach - Interpretation of terms and conditions - Calculation of three-year period - Whether trial judge wrongly interpreted terms of contract* D

E

DAMAGES: *Measure of damages - Assessment - Airline pilot, training course for - Agreement - Alleged breach by 1st respondent pilot - Whether liable to pay 150% of liquidated sum as agreed - Whether appellant airline to be compensated for benefits enjoyed by 1st respondent - Trial judge requested appellant to prove actual damages - Whether actual damages incapable of being assessed or proven - Whether trial judge erred in fact and law - Contracts Act 1950, s. 75* F

This was an appeal by the appellant against the Sessions Court's decision, dismissing the appellant's claim against the respondents G for breach of agreement and allowing the respondents' counterclaim against the appellant. The 1st respondent was a former pilot of the appellant and the 2nd respondent was his wife. The respondents had entered into an agreement on 6 May 1999 with the appellant. That agreement was for a course of B737 H conversion training provided for the 1st respondent at the appellant's expenses and the 2nd respondent was the named guarantor for the 1st respondent. The purpose of the training was to enable the 1st respondent to operate and captain the B737 aircrafts which served as a promotion for him upon successful I

completion of the said training. The agreement was bounded with relevant terms and conditions. The 1st respondent signed the agreement and undertook to remain in service with the appellant until 8 February 2002, but on 26 August 1999, he tendered his resignation. The appellant accepted the 1st respondent's resignation and filed an action for damages against the respondents for breaching the training agreement. In its claim for damages, the appellant submitted a figure of 150% as a genuine pre-estimated damage likely to be suffered by it in the event of breach. Despite that submission, the appellant also pleaded for an alternative sum of RM91,463.64 as the actual amount spent by it. The respondents counterclaimed and contended that they were not bound by the terms of the said agreement as the appellant had unilaterally terminated the course without any reason.

Held (allowing the appellant's claim; dismissing the respondents' counterclaim with costs):

(1) Reading the agreement as a whole, there was an express provision which stipulated that reason should be given if the training was to be terminated and, thus, the termination by the appellant had to be in writing and communicated to the 1st respondent. The burden of proof was on the 1st respondent to prove that the training was terminated as alleged by him. This he failed to do. Termination could not be based on assumption and there was merit in the appellant's argument that the 1st respondent had undergone all four stages of the training but failed to complete the last stage. In any case, contrary to the finding of the trial judge, the training was not terminated as the appellant, at the material time, was still waiting for recommendation from the chief pilot and higher management on whether to extend or terminate the said training. (para 14)

(2) The trial judge had misunderstood cl. 4 of the training agreement. Clause 4 states that the 1st respondent should agree to remain with the company for a period of three years from the date the training commenced. Under that said clause, the calculation of the three-year period began from the date the training commenced. In this case, since the commencement of the training, the 1st respondent had only

served the appellant for five months before his resignation. As such, it was the 1st respondent who had breached the agreement and therefore liable to pay damages as stipulated in the agreement. (para 15)

(3) The wordings or language used in the agreement were clear and not ambiguous, in that the respondents had agreed to pay 150% of the liquidated sum as damages for breaching the agreement. The actual damages were incapable of being assessed or proven due to the nature of the training and for that reason, the trial judge had erred in holding that the appellant was required to prove damages under s. 75 of the Contracts Act 1950. There was no dispute that the appellant need only prove an estimate and not actual damages due to the difficulties in assessing the damages. (paras 17, 19, 20 & 22)

(4) The trial judge had erred in fact and law in her conclusion. The appellant had proved on a balance of probability that it was the 1st respondent who had breached the training agreement when he chose to resign before completing the compulsory service of three years. Consequently, the decision of the Sessions Court was set aside. (para 25)

[Appellant granted alternative sum of RM91,463.64 with 8% interest thereon calculated from 27 January 2000 until satisfaction.]

Case(s) referred to:

Central Bank of India v. Hartford Fire Insurance Co Ltd [1965] AIR SC 1288 ***(refd)***

Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75

For the appellant - Oommen Kurien; M/s Zaid Ibrahim & Co
For the respondents - Steven Wong; M/s Arifin & Partners

Reported by Melanie Murthy

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JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

B **[1]** This appeal is against the decision of the Sessions Court Judge given on 20 October 2009, dismissing with costs the appellant's/plaintiff's claim against the respondents/defendants' and allowing the 1st respondent's/1st defendant's counterclaim with costs.

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Background Facts

[2] The 1st respondent was a former pilot of the appellant. The 2nd respondent is the wife of the 1st respondent. The respondents had entered into the Course Conversion Training Agreement dated 6 May 1999 (the agreement) with the appellant wherein the appellant was to provide the 1st respondent a course of B737 conversion training at the appellant's expense subject to the terms and conditions stated therein. The 2nd respondent is the named guarantor of the 1st respondent in the said agreement. The purpose of the training is to enable the 1st respondent to operate and become a captain to B737 aircrafts. It is a promotion to the 1st respondent if he successfully completed the training.

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[3] For the purpose of this appeal, the relevant terms of the agreement are cls. 4, 5 & 6. These clauses provides as follows:

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Clause 4

The pilot shall agree to remain in the service of the company for a period of three (3) years from the date of commencement of such aforesaid conversion training as required by the company.

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Clause 5(a)

H The total costs of this training is RM162,000.

Clause 5(b)

In the event of the Pilot:

I (i) Leaving the service of the company during the period of three (3) years referred to in cl. 4 above; or

(ii) Being dismissed or having bind themselves jointly and severally to pay the company as liquidated damages 150 % of the liquidated sum during the period of three (3) years referred to in cl. 4 above.

Clause 6

The provision of cl. 5 above shall not apply in a case where a pilot has his training terminated by the company for reasons other than misconduct or where, subsequent to the completion of the training, he …

[4] The date of the commencement of the course is stipulated as 8 February 1999. Therefore, upon signing the agreement, the 1st respondent was supposed to remain in the service of the appellant until 8 February 2002 unless his service was terminated by the appellant for reasons other than misconduct. In breach of the training agreement, the 1st respondent had tendered his resignation *vide* a letter dated 26 August 1999. The resignation took effect immediately. The appellant duly accepted the 1st respondent's resignation and filed this action against the respondents for breaching the training agreement. In this action, the appellant claim against the respondents for the followings:

(a) a sum of RM218,444.03; or alternatively;

(b) a sum of RM91,463.64; and

(c) Interest of 8 % on the sum, either (a) or (b) calculated from 27 January 2000 till satisfaction; and

(d) costs.

[5] The respondents' defence was the appellant had unilaterally terminated the Course Conversion Training Agreement without any reasons and therefore they are not bound by the terms of the said agreement. The 1st respondent's counterclaim for:

(a) his salary for the balance of 153 days leave;

(b) his EPF contribution for the 153 days leave;

(c) damages for breach of contract;

(d) interest; and

(e) costs

A **The Respondents' Liability Under The Agreement**

[6] Evidence led before the trial court revealed that there are four stages of the training course as follows:

B Stage 1: Ground School Training

Stage 2: Simulator Training

Stage 3: Aircraft Endorsement Training

C Stage 4: Line Training

[7] It is not disputed that the 1st respondent had begun Ground School Training on 8 February 1999 and had passed and completed stage 1 to stage 3. With regard to the final stage, the 1st respondent had begun this line training on 10 June 1999 D and continues from 27 June 1999 to 24 July 1999. The last day of the training was on 29 July 1999. All in, he took 23 days for this training. From 29 July 1999 onwards there was no training. He wrote a letter dated 10 August 1999 to the appellant appealing to reinstate the training. There was no reply from the E appellant. On 26 August 1999, the 1st respondent tenders his resignation letter. In the said letter, the 1st respondent did not state any reason for his resignation. But in his oral testimony before the court, he gave the following reasons for the resignation:

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a) conversion training was terminated abruptly without any reason on 29 July 1999;

b) termination done unilaterally;

G c) appellant did not reinstate training and did not reply to his letter of 10 August 1999;

d) From 29 July 1999 to 26 August 1999, appellant failed to place him for nay flying duties nor was he informed as to H what was his future with the appellant;

e) the appellant did not inform him of anything.

[8] I find it hard to believe the above reasons given by the 1st respondent simply because in his resignation letter of 26 August I 1999, the earliest opportunity he had, the 1st respondent did not

deem it fit to state the reasons. The first time he made known of the reasons was ten years later (his evidence was recorded on 30 September 2009). This is clearly an after thought and ought to be rejected by the court.

[9] It is not disputed that for line training, the minimum numbers of sectors a pilot would have to undertake to complete this stage of the course is 30 and the maximum is 60. The 1st respondent had underwent 64 sectors and he was recommended by his instructor to extend his line training. The instructor had advised that the 1st respondent required "A few more sectors before command check". In the circumstances, although the 1st respondent had completed the requisite number of sectors to complete the line training, he had not completed the line training as his instructor had not certified his completion but required him to undergo a few more sectors. 1st respondent was grounded from 30 July 2007 till the day he resign. When asked about the position of the 1st respondent, PW3 states the 1st respondent was grounded pending the decision of the chief pilot whether to extend or terminate the training. In this case, the appellant did not terminate but extended the 1st respondent's line training. This evidence was not challenged by the respondents. At the same time, there was no dispute that neither any extension nor termination of the training was ever informed to the 1st respondent.

Issue

[10] Whether the trial judge was right in concluding that the appellant had unilaterally terminated the 1st respondent's Course Training effective 29 July 1999?

Findings Of The Session Judge

[11] In her grounds of judgment, the learned trial judge made the following findings:

1. Latihan conversion telah diberhentikan secara unilateral oleh plaintif pada 29 July 1999.

2. Sekiranya plaintif tidak berniat untuk memberhentikan latihan, kenapakah plaintif tidak memberi apa-apa balasan kepada surat defendan bertarikh 10 August 1999.

A 3. Plaintif tidak memerlukan defendan pertama untuk kekal dalam perkhidmatan plaintif selama tiga tahun.

4. Sekiranya kl. 5 terpakai pun, plaintif gagal membuktikan kerugian sebenar yang dialami. Kos-kos yang dirujuk bukan
B kos sebenar yang ditanggung plaintif untuk defendan pertama kerana ia adalah bagi tahun-tahun yang tidak berkaitan.

Appellant's Submission

[12] The appellant's submit and I agree that the only basis on
C which the trial judge based her decision that the training was terminated unilaterally was the fact that the 1st respondent was not given any training from 29 July 1999 onwards and the appellant had failed to respond to the 1st respondent's letter of 10 August 2009 requesting for a reinstatement of the training.
D The question is was the trial judge right in her conclusion?

[13] The appellant sought to justify their failure to reply to the 1st respondent's letter by saying the 1st respondent's letter did not stipulate the time frame for the appellant to reply. As such,
E the appellant only need to reply within a reasonable period. After all, the 1st respondent is still an employee of the appellant. They further submit that the trial judge seems to have overlooked the fact the 1st respondent had immediately obtained employment with another competitor airline upon his resignation with the appellant.
F Finally, the appellant submit in view of the recommendation that the 1st respondent only needed "A few more sectors before command check" indicates there is a slim chance of the appellant terminating the training course. Especially so when the appellant had expended huge sum of money.

G **[14]** On the issue of whether the training had been unilaterally terminated by the appellant, I was of the opinion the court must look at the surrounding circumstances of the case and not just the failure of the appellant to respond to the 1st respondent's letter.
H First of all, reading the agreement as a whole, I find there was an express provision that reason must be given if training is to be terminated. If that is the case, the termination had to be in writing and communicated to the 1st respondent. In this case, it was the 1st respondent who alleged that the training was terminated. The
I burden lies on the 1st respondent to prove the same. It is

obvious that the 1st respondent only relied on the fact he was grounded and the non-respond by the appellant after 29 July 1999 to 26 August 1999. If the 1st respondent's argument is accepted as true, he cannot give any reason for the termination. On the other hand, I find there is merit in the appellant's argument in that the 1st respondent had undergone all the four stages of the training. He only failed to complete the last stage of the training. His case was, the appellant is awaiting a recommendation from the chief pilot and higher management either to terminate or extend the training. But the 1st respondent could not wait any longer. In view of the expenses incurred to conduct the training and its effect if the training is terminated, I was of the view that its termination is not something that can be assumed. There must be a positive assertion by the appellant that they decided to terminate the training with reason given. Until and unless this happen, there is no termination of the training. Therefore, contrary to the findings made by the trial judge, I hold there was no termination of the training.

[15] Next is the issue of whether there was no liability attached to the 1st respondent because the appellant does not require the 1st respondent to remain in the employment of the appellant for three years. I find this findings of the trial judge is inaccurate. It is obvious that she has misunderstood cl. 4. Under the said clause, the calculation of three years period begins from the commencement of the training. Not whether the appellant requires the 1st respondent to remain in employment or not. In this case, there was no denial by the 1st respondent that from the date he commenced training on 8 February 1999 to the date he resigns on 26 August 1999, he only serves the appellant for five months. He therefore has breached cl. 4 of the agreement. In final analysis, it is obvious that it was the 1st respondent who had breached the agreement and not the appellant. In the circumstances, the respondents are liable to pay damages to the appellant as stipulated in the agreement.

Liquidated And Ascertained Damages

[16] Pursuant to cl. 5(a) of the Course Conversion Training Agreement, the sum stated as liquidated damages is RM162,000 and pursuant to cl. 5(b) of the same, in the event the 1st

respondent leaves the appellant's employment prior to the expiry of the three years period stipulated in cl. 4, the respondents are liable to pay to the appellant 150% of the liquidated damages.

[17] I agree with the appellant's submission that the wordings or language used in the contract are clear. There is no ambiguity whatsoever. In the circumstances, the court must give effect to the intention of the parties by referring to the words used within the four corner of the agreement only. Support for this proposition is found in the case of *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37, wherein Lim Beng Choon J states the law in the following words:

> In considering the disputes of the parties I must first of all bear in mind the principles of construction of contract as enunciated in the *National Coal Board v. Wm Neil & Son (St Helens) Ltd* [1984] 1 All ER 555 where it is said at p. 560:
>
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are:
> >
> > (1) construction of a contract is a question of law;
> >
> > (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case);
> >
> > (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later;
> >
> > (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

[18] In *Central Bank of India v. Hartford Fire Insurance Co Ltd* [1965] AIR SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Son (St Helen) Ltd* case when it says at p. 1290:

> Now it is commonplace that it is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the Court has to do. The Court must give effect to the plain meaning of the words however much it may dislike the result.

[19] The appellant submit the respondents not only have voluntarily entered into the agreement but they have also not raised any issue with regard to the validity of the agreement. As such, *prima facie*, the respondents have agreed to pay 150% of the liquidated sum as damages for breaching the agreement. This court was urged to give effect to the plain meaning of the words of the agreement. I agree entirely with the appellant's submission on this point.

[20] The appellant further submits the nature of the training is one where damages are incapable of being specifically ascertained owing to the subject of the agreement. Whether the training caters for ten pilots or only one pilot, the cost remain the same. In the circumstances, it is submitted that the liquidated damages is a genuine pre-estimate of the damages that the appellant would suffer in the event a pilot had breached the agreement. There is simply no way of assessing or proving actual damages. For that reason, it is submitted that the trial judge was wrong in holding that under s. 75 of the Contracts Act 1950, the appellant is required to prove actual damage.

[21] In *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374, the Federal Court laid down the principles that should be applied whenever there is a penalty clause.

(1) In Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s. 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, whether or not actual damage or loss is proved to have been caused thereby.

(2) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provision.

[22] There was no dispute that the appellant had only proved an estimate and the appellant is not obliged to prove actual damage because it is difficult to assess the damage. I had taken into consideration the evidence of PW3 that it is very difficult to calculate the actual cost. Therefore prove of pre-genuine estimate as in this case is sufficient.

[23] The rationale behind the imposition of 150% liquidated damages was explained by the appellant's witness, PW1 as follows:

> If a pilot leaves MAS, the vacancy needs to be filled by promoting another pilot from the lower fleet. In doing so, there is now a vacancy at the lower fleet, which again needs to be filled and this process goes on. The other point is that the pilot is given a promotion with an increased pay and is more marketable by virtue of being able to fly a higher fleet after completing the conversion training. Further, the amount is a formula agreed by MAS and MAPA as being fair and reasonable in consideration of the memorandum of understanding being revised, which include substantial pay increase to the pilots.

[24] In the circumstances, the appellant submit the figure of 150% of the liquidated sum is merely a genuine pre-estimate of the damage likely to be suffered by the appellant. Despite the submission on the 150% damages, the appellant also has pleaded an alternative figure of RM91,463.64 as the actual amount spent by them. Since there was an overwhelming evidence that there were various costs incurred by the appellant in conducting the training, there was no doubt the appellant had suffered a loss in this sum as a result of the 1st respondent's breach. I chose to allow the alternative figure of RM91,463.64 together with interest thereon at the rate of 8% calculated from 27 January 2000 till satisfaction.

Decision

[25] Having read the appeal records and submission of parties, I agree with the appellants' submission that the trial judge had erred in facts and law in her conclusion. The appellant has proved on the balance of probability that it was the 1st respondent who had breached the training agreement when he chose to resign before completing the compulsory service of three years. For the aforesaid reasons, I allowed the appeal. The decision of the Session Judge is set aside. Judgment is entered for the appellant as prayed for in prayer 12(b), (c) & (d) of the statement of claim. The 1st respondent's counter claim is dismissed with costs.